Supreme Court, U.S.
FILED
031286 MAR 3 - 2004

No. _____

In the Supreme Court of the United States

JOE E. GODWIN, et al.,

Petitioners,

v.

OFFICER MICHAEL HILL, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ANDREW C. CLARKE
Counsel of Record
BAILEY & CLARKE
6256 POPLAR AVENUE
MEMPHIS, TN 38119
(901) 680-9777

C.S. CHIEPALICH
LAW OFFICE OF C.S. CHIEPALICH
1860 GOVERNMENT STREET
MOBILE, AL 36606
(251) 478-1666

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED

I. Whether the Eleventh Circuit properly determined that Officer Hill was entitled to qualified immunity under the standard enunciated in *Hope v. Pelzer*, 536 U.S. 730 (2002), which rejected the Eleventh Circuit's long-standing requirement of a case with "materially similar" facts before determining that the law was clearly established?

II. Whether *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) provided Officer Hill with "fair notice" or "fair warning" that his conduct during the course of a pursuit could violate the substantive due process rights of Petitioners' children?

PARTIES TO THE PROCEEDING

Petitioners

Joe Godwin is the Administrator of the Estates of Jessica Godwin and Jeremiah Godwin. Keith Daniels is the Administrator of the Estate of Jonathon Christopher Daniels. Wanda Evers is the Administratrix of the Estate of Jeffrey Bryan Cubicke. These parties will be collectively referred to as Petitioners. Petitioners were plaintiffs in the District Court proceedings and appellees before the Eleventh Circuit Court of Appeals on interlocutory appeal.

Respondents

Officer Michael Hill was a defendant in the District Court proceedings and the appellant before the Eleventh Circuit Court of Appeals on interlocutory appeal.

Other Parties

The Petitioners also sued the City of Gulf Shores, Alabama and Chief Arthur Bourne. The City of Gulf Shores, Alabama and Chief Arthur Bourne were not parties to the interlocutory appeal and, therefore, have no direct interest in the outcome of this Petition.

TABLE OF CONTENTS

Question Presented for Review i
Parties to the Proceedings ii
Table of Contents iii
Table of Authorities vi
Petition for *Certiorari* 1
Opinions Below 1
Statement of Jurisdiction 2
Constitutional Provisions and Statute Involved 2
Statement of the Case 3
A. Proceedings 3
B. Statement of Facts 6

Reason for Granting Writ 9

I. *Certiorari* Should Be Granted To Ensure That The Eleventh Circuit Is Properly Complying With This Honorable Court's Mandate in *Hope v. Pelzer*, 536 U.S. 730 (2002) In Determining Whether The Law Is Clearly Established Under A Qualified Immunity Analysis 9

II. *Certiorari* Should Be Granted To Determine Whether *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) provided Officer Hill with "fair notice" or "fair warning" that his conduct during the course of a pursuit could violate the substantive due process rights of the Petitioners' children 24

Conclusion 27

APPENDIX

Appendix A
Opinion Denying Petition for Rehearing and Rehearing *En Banc* - December 12, 2003 . . . . . 1a

Appendix B
Order of 11th Circuit - October 3, 2003 . . . . . 4a

Appendix C
Order of District Court - February 10, 2003 . . . . . 9a

Appendix D
Order of District Court - March 28, 2002 . . . . . 23a

TABLE OF AUTHORITIES

Cases Cited:

Acoff v. Abston, ... 20
762 F.2d 1543 (11th Cir. 1985)

Anderson v. Creighton, ... 11
483 U.S. 635, 107 S.Ct. 3034, 98 L.Ed.2d 523 (1987)

Bell v. Wolfish, ... 16
441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)

Behrens v. Pelletier, ... 22
516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996)

Cannon v. Taylor, ... 26
782 F.2d 947 (11th Cir. 1986)

Carr v. Tatangelo, ... 11
338 F.3d 1259 (11th Cir. 2003)

Checki v. Webb, ... 25, 26
785 F.2d 534 (5th Cir. 1986)

County of Sacramento v. Lewis, ... 6, 24, 25
523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)

Durruthy v. Pastor, ... 11
351 F.3d 1080 (11th Cir. 2003)

Evans v. City of Zebulon, ... 11, 15, 16, 18
351 F.3d 485 (11th Cir. 2003) (Propst, D.J., concurring in part and dissenting in part)

Graham v. Connor, ... 20
490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)

Harlow v. Fitzgerald, ... 10
457 U.S. 808 (1982)

Hill v. Dekalb Regional Youth Detention Center, ... 10
40 F.3d 1176 (11th Cir. 1994)

Hope v. Pelzer, ... *passim*
536 U.S. 730, 122 S.Ct. 2508 (2002)

Justice v. City of Peachtree City, ... 16, 17
961 F.2d 188 (11th Cir. 1992)

Lassiter v. Alabama A & M Univ. Bd. of Trustees, ... 10
28 F.3d 1146 (11th Cir 1994)

Lee v. Ferraro, ... 18
284 F.3d 1188 (11th Cir. 2002)

Marsh v. Butler County, ... 18
268 F.3d 1014 (11th Cir. 2001) (*en banc*)

New Jersey v. T.L.O., ... 13
469 U.S. 325 (1985)

Saucier v. Katz, ... 22
533 U.S. 194, 121 S.Ct. 2151 150 L.Ed.2d 272 (2001)

Suissa v. Fulton County, ... 10
74 F.3d 266 (11th Cir. 1996)

Tennessee v. Garner, ... 19, 20, 22, 23
471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)

Thomas v. Roberts, ... 11, 13
323 F.3d 950 (11th Cir. 2003), *rehearing and rehearing en banc denied*, 73 Fed. Appx. 389 (Jun. 18, 2003)

United States v. Lanier, ... 10, 11
520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)

Vaughan v. Cox, ... *passim*
264 F.3d 1027 (11th Cir. 2001) (Noonan, J., dissenting), *vacated and remanded*, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002), *reinstated*, 316 F.3d 1210 (11th Cir. 2003), *cert. denied*, 123 S.Ct. 2252, 156 L.Ed.2d 112 (Jun. 2, 2003), *reversed sua sponte*, 343 F.3d 1323 (11th Cir. 2003), *rehearing and rehearing en banc denied*, ___ F.3d ___, 2003 WL 22994454 (11th Cir. Dec. 9, 2003)

Willingham v. Loughnan, ... 12-15
321 F.3d 1299 (11th Cir. 2003), *cert. denied*, 124 S.Ct. 76, 157 L.Ed.2d 32 (Oct. 6, 2003)

Statutes Cited:

28 U.S.C. §1254(1) 2

42 U.S.C. § 1983 . . . . . *passim*

United States Constitution Cited:

Amendment XIV, § 1 2

PETITION FOR WRIT OF *CERTIORARI*

Joe Godwin, as Administrator of the Estate of Jessica Godwin and as Administrator of the Estate of Jeremiah Godwin, Keith Daniels, as Administrator of the Estate of Jonathon Christopher Daniels, and Wanda Evers, as Administratrix of the Estate of Jeffrey Bryan Cubicke, respectfully petition for a writ of *certiorari* to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS BELOW

On March 28, 2002,The District Court entered an Order granting in part and denying in part Officer Hill's motion for summary judgment. In particular, the District Court found that Officer Hill was entitled to qualified immunity. (App. D, 23a-43a).

After this Court ruled in *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508 (2002), Petitioners filed a Motion to Reconsider the District Court's Order granting qualified immunity to Officer Hill and Chief Bourne. On February 10, 2003, the District Court entered an Order reversing its holding that Officer Hill was entitled to qualified immunity. (App. C, pp.9a-22a). Officer Hill appealed this Order.

On October 3, 2003, the Eleventh Circuit entered a one paragraph *per curiam* opinion reversing the District Court's Order of February 10, 2003, and granting Officer Hill qualified immunity. (App. B, pp. 4a-8a). Petitioners filed a Petition for Rehearing and Rehearing *En Banc* to the Eleventh Circuit on October 21, 2003. On December 12, 2003, the Eleventh Circuit entered a one-paragraph *per curiam* opinion

denying the Petition for Rehearing and Rehearing *En Banc* to the Eleventh Circuit. (App. A, pp. 1a-3a).

STATEMENT OF JURISDICTION

The Judgment of the Eleventh Circuit sought to be reviewed was entered on October 21, 2003, and the decision denying Petitioners' request for Rehearing or Rehearing *En Banc* was entered on December 12, 2003. Petitioners invoke the *certiorari* jurisdiction conferred on this Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings

Petitioners sued Officer Michael Hill, Chief Arthur Bourne and the City of Gulf Shores, Alabama alleging that: 1) Officer Hill's conduct during the course of a high-speed pursuit violated the substantive due process rights of Petitioners' decedents; and 2) Chief Bourne and the City of Gulf Shores, Alabama violated the substantive due process rights of Petitioners' decedents by maintaining policies, practices and/or customs that were deliberately indifferent to Petitioners' decedents' constitutional rights.

Defendants filed a Motion to Dismiss which was granted in part and denied in part by the District Court on March 28, 2002. (App. D). Specifically, the District Court found that the allegations in the Amended Complaint stated a cause of action for the violation of the Petitioners' decedents' substantive due process rights. (App. D, pp. 28a-30a; 46a-47a). However, the District Court found that Officer Hill and Chief Bourne were entitled to qualified immunity based on long-standing Eleventh Circuit precedent which required a case with "materially similar" facts to clearly established the law. (App. D, pp. 37a-42a).

After this Honorable Court ruled in *Hope v. Pelzer*, 536 U.S. 730 (2002), Petitioners filed a Motion to Reconsider the District Court's Order granting qualified immunity to Officer Hill. On February 10, 2003, the District Court entered an

Order reversing its ruling that Officer Hill was entitled to qualified immunity, holding:

a. The sole fact that Officer Hill was not flashing his lights and using his sirens may lead to the conclusion that he intended to harm the Plaintiffs. Lights and sirens are intended, in part, to give people notice and warning about a potentially hazardous situation, such as a police car giving chase to another vehicle at a high rate of speed.... [T]he Court previously noted that absence of lights and sirens may lead the jury to "reasonably conclude that either the pursuit was not aimed at apprehending a suspect or that there was intent to cause harm or worsen the legal plight of the automobile's driver." Thus, alone, the absence of lights and sirens could evidence a purpose to harm. (App. C, pp. 17a-18a);

b. The length of the pursuit does not automatically transform an officer's legitimate object of arrest into an intent to harm... The length of the chase, while giving Officer Hill more time to recognize the safety issue, does not necessarily lead to the conclusion that Officer Hill intended to harm Plaintiffs. Nevertheless, the Court finds the assumed fact that Officer Hill witnessed two people in the bed of the truck during the chase very disturbing. Officer Hill allegedly initially signaled for the truck to pull over because of a speeding violation, but did not activate his lights and sirens. Notwithstanding, the driver of the truck did not pull over, but attempted to flee after leaving the jurisdiction of the Gulf Shores Police Department. In the light most favorable to the

Plaintiffs, Officer Hill, during the course of the chase, did observe the license plate of the truck. Thus, Officer Hill had sufficient information to arrest the driver at a later time since the vehicle was not reported stolen. (App. C, pp. 18a-19a);

c. Nonetheless, the need to effect a stop for speeding must yield in the presence of safety concerns. For the purposes of this Order, Officer Hill observed two passengers in the bed of the speeding truck who were unwilling participants in the chase. Obviously, the driver has voluntarily chosen to put himself in a dangerous situation, but the same cannot be said for his passengers. The two passengers in the bed of the truck may not have been able to effectively communicate their desire for an end to the chase for the driver. Thus, those two passengers were faced with a harrowing twenty-five minute ride in the back of the truck that covered almost half of Baldwin County even after Officer Hill had gathered enough information to make a proper arrest of the driver at a later date. (App. C, pp. 19a); and

d. It is difficult to see how the chase was related to the legitimate object of arrest of the driver when Officer Hill had gathered enough information to effect an arrest at a later time, yet continued pursuit without lights or sirens after he recognized the grave danger that the chase posed to the passengers in the bed of the truck. The Court concludes that the evidence infers Officer Hill's intent was to cause harm to Plaintiffs. In finding that conclusion, the Court considers Officer Hill's action to shock the conscience under the "intent to

> harm" standard set forth in *Lewis*. Thus, the Court finds that, pursuant to *Lewis*, Officer Hill received fair warning that his actions violated clearly established law. Therefore, the Court concludes that Officer Hill is not entitled to receive qualified immunity as to the federal claims based on the Fourteenth Amendment asserted against him in his individual capacity. (App. C, pp. 19a).

On October 3, 2003, the Eleventh Circuit entered a one paragraph *per curiam* opinion reversing the District Court's Order of February 10, 2003, and granting Officer Hill qualified immunity. (App. B). Petitioners filed a Petition for Rehearing and Rehearing *En Banc* to the Eleventh Circuit on October 21, 2003. On December 12, 2003, the Eleventh Circuit entered a one paragraph *per curiam* opinion denying the Petition for Rehearing and Rehearing *En Banc* to the Eleventh Circuit. (App. A).

It is upon these proceedings that this matter has come before this Court for consideration of the issues presented.

B. Statement of Facts.

On July 16, 1999, at 3:29 a.m., a pick-up truck being driven by David Sanford which was being pursued by Officer Hill was involved in an automobile accident, killing Petitioners' children.

At all times: 1) David Sanford was the driver of the pick-up truck and had exclusive control over its operation; 2) Jeremiah Godwin and Jeffery Cubicke were passengers in the cab of the pick-up truck; and 3) Jessica Godwin and Jonathan

Daniels were passengers in the bed of the pick-up truck who were plainly visible to Officer Hill.

On July 16, 1999, at approximately 3:14 a.m., Officer Hill observed a pick-up truck being driven by David Sanford traveling 60 mph in a 45 mph zone. As a result of this traffic offense, Officer Hill initiated a traffic stop of the vehicle for speeding. As Officer Hill pulled behind the vehicle, he observed the license plate number which he transmitted to his dispatcher. Officer Hill was advised that the vehicle was not reported lost or stolen. With this information, Officer Hill could have identified the driver of the vehicle at a later time without exposing the Petitioners' children to a deadly and dangerous high-speed pursuit. Therefore, this high-speed pursuit was unjustified and served no legitimate law enforcement purpose.

At no time did Officer Hill have any information indicating that the occupants of the vehicle, Petitioners' decedents, had committed any crime. As Petitioners' children were not accused of committing any crime, exposing them to the dangers of a deadly high-speed pursuit was totally unjustified and evidenced Officer Hill's intent to injure or worsen the legal plight of Petitioners' decedents.

The entire pursuit occurred outside the police jurisdiction of the City of Gulf Shores where Officer Hill had no discretion to enforce speeding laws pursuant to Alabama Code § 32-5A-171(9). As the pursuit entered the town of Foley, officers from the Foley Police Department (FPD) joined the pursuit. However, Sgt. Roper of the Foley Police Department (FPD) advised his officers to discontinue the pursuit as the obvious dangers of the pursuit were greatly outweighed by any benefit to society of apprehending a traffic offender.

The pursuit covered approximately 25 miles and lasted approximately 15 minutes. The pursuit reached speeds in excess of 100 m.p.h. and traveled through approximately 20 intersections controlled by traffic lights and/or stop signs, in addition to countless side streets. During the entire pursuit, two helpless passengers were plainly visible in the bed of the pick-up truck. During the course of the pursuit, Officer Hill failed to continuously utilize his lights and sirens as required by Alabama law.

Given the length and obvious dangers of the pursuit, Officer Hill had sufficient time to deliberate and consider his actions, but he intentionally chose to continue the pursuit. It is clear that Officer Hill could have, and should have, discontinued the pursuit as required by policy and attempted to apprehend the driver at a later time without exposing Petitioners' children to the dangers of the pursuit. Therefore, these facts indicate that the high-speed pursuit served no legitimate law enforcement purpose and clearly endangered the Plaintiffs' decedents.

According to the Gulf Shores Police Department (GSPD) pursuit policy, high-speed pursuit should only be used as a last resort to apprehend those suspects who pose an immediate danger to society. Based on the GSPD policy, it is clear that this high-speed pursuit should have never taken place and served no legitimate law enforcement purpose. In fact, this high-speed pursuit of a traffic offender only served to increase the risk and probability of death to Petitioners' decedents, which clearly illustrates Officer Hill's intent to injure or worsen the legal plight of the Petitioners' children.

Officer Hill's high-speed pursuit of Mr. Sanford was intentional, deliberately indifferent and conscience shocking. The speed and distance of the pursuit indicates that Officer

Hill had no concern for the safety of Petitioners' decedents. Further, Officer Hill failed to continuously utilize his lights and sirens during the course of the high-speed pursuit. Giving Petitioners all permissible inferences to which they are entitled under the law, the facts clearly indicate that Officer Hill intended to follow the pick-up until it crashed or voluntarily stopped. Therefore, Officer Hill's conduct displayed an intent to injure or to worsen the legal plight of Petitioners' decedents.

Based on these facts and the standard announced in *Hope v. Pelzer*, 122 S.Ct. 2508 (2002), Petitioners aver that the District Court properly concluded that Officer Hill was not entitled to qualified immunity as he had "fair warning" that his conduct during the pursuit may have violated the substantive due process rights of Petitioners' children. Petitioners further submit that the Eleventh Circuit failed to comply with the requirements of *Hope v. Pelzer*, *supra*, in analyzing Officer Hill's claim to qualified immunity.

REASONS FOR GRANTING THE WRIT

I. *Certiorari* Should Be Granted To Ensure That The Eleventh Circuit Is Properly Complying With This Honorable Court's Mandate in *Hope v. Pelzer* In Determining Whether The Law Is Clearly Established Under A Qualified Immunity Analysis.

In *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508 (2002), this Court clearly rejected the Eleventh Circuit's long-standing method of determining whether the law is clearly established under a qualified immunity analysis. As this Court noted:

> In assessing whether the Eighth Amendment violation here met the *Harlow* test, the Court of Appeals required that the facts of previous cases be "'materially similar' to Hope/s situation." 240 F.3d, at 981. This rigid gloss on the qualified immunity standard, though supported by Circuit precedent,[1] is not consistent with our cases.

Id. at 2515.

After rejecting the Eleventh Circuit's requirement of a case with materially similar facts before finding that the law was clearly established under a qualified immunity analysis, this Court held:

> Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts. Accordingly, pursuant to *Lanier,* the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents

---

[1] *See, e.g., Suissa v. Fulton County,* 74 F.3d 266-70 (11th Cir. 1996); *Hill v. Dekalb Regional Youth Detention Center,* 40 F.3d 1176, 1185 (11th Cir. 1994); *Lassiter v. Alabama A. & M. Univ. Bd. of Trustees,* 28 F.3d 1146, 1150 (11th Cir. 1994).

> **fair warning** that their alleged treatment of Hope was unconstitutional.

Id. at 2515-2516. (Emphasis added).

Since *Hope*, it is clear that the Eleventh Circuit's requirement that there be a case with "materially similar" or "fundamentally similar" facts in order to find that the law is clearly established has been overruled. All that is required for law to be clearly established is that an officer have "fair warning" or "fair notice" that his actions violate someone's constitutional rights. *United States v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2D 432 (1997). While a high degree of factual particularity may indicate that the law is clearly established, fair notice may be provided by a general constitutional rule identified in the decisional law that applies with obvious clarity to the specific conduct in question "even though the very action in question has [not] previously been held unlawful." *Hope*, 536 U.S. 730, 739, 122 S.Ct. 2508, 2515-16 (citations omitted).

An overview of recent Eleventh Circuit opinions shows that despite the clear mandate in *Hope v. Pelzer*, the Eleventh Circuit has continued to interpret language from *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 98 L.Ed. 2d 523 (1987) to require that there be a factually and substantially similar case predating the conduct in question in order to find that the law clearly was established. *See, e.g., Carr v. Tatangelo*, 338 F.3d 1259, 1266 (11th Cir. 2003); *Durruthy v. Pastor*, 351 F.3d 1080 (11th Cir. 2003); *Evans v. City of Zebulon*, 351 F.3d 485, 494 (11th Cir. 2003); *Thomas v. Roberts*, 323 F.3d 950, 951-52 (11th Cir. 2003) (on remand from the Supreme Court in light of *Hope*); *Vaughan v. Cox*, 316 F.3d 1210 (11th Cir. 2003) (Noonan, J., dissenting), (on remand from the Supreme Court in light of *Hope*), *reversed*

sua sponte, 343 F.3d 1323 (11th Cir. 2003); *Willingham v. Loughnan*, 321 F.3d 1299, 1300, n.1 (11th Cir. 2003) (requiring facts substantially similar to *Hope* in order for the *Hope* ruling to apply).

Despite this Court's Order vacating numerous opinions and remanding them to the Eleventh Circuit in light of *Hope*, in *Willingham v. Loughnan*, *Vaughan v. Cox*, and *Thomas v. Roberts*, the Eleventh Circuit reinstated its prior opinions in their entirety. A review of these cases and others clearly illustrates that the Eleventh Circuit is failing to comply with the mandate from *Hope v. Pelzer*.

In *Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003), students sued the school district and school employees pursuant to 42 U.S.C.§ 1983, alleging that they were subject to unconstitutional strip searches. *See id.* at 951. The Eleventh Circuit found that the employees of the school district were entitled to qualified immunity. *Id.* After *Hope* was decided, this Court accepted *certiorari* in *Thomas*, vacated the opinion of the Eleventh Circuit, and remanded it to the Eleventh Circuit for reconsideration of the decision to grant the school district employees qualified immunity pursuant to *Hope*. *Id.* at 951-952.

On remand, the Eleventh Circuit again found that the governmental actors were entitled to qualified immunity. *See id.* Despite this Court's clear directive in *Hope* rejecting the Eleventh Circuit's long-standing practice of requiring cases with materially similar facts, the Eleventh Circuit still held that decisional law from the Eleventh Circuit or the Supreme Court involving virtually identical factual situations was required in order to deny qualified immunity and to find that the law was clearly established. As the Eleventh Circuit noted on remand:

> Plaintiffs appear to argue that [*New Jersey v. T.L.O.*, 469 U.S. 325]'s balancing test should have put Defendants on notice that a "strip search" would be unlawful. If the salient question is whether *T.L.O.* gave the defendants "fair warning" that a "strip search" of an elementary school class for missing money would be unconstitutional, then the answer must be "no." *T.L.O.*'s balancing test will, in most instances, call for school officials to speculate as to whether a court applying the balancing test to specific facts would find a strip search unreasonable. As this court has noted, where the applicable legal standard is a highly general one, such as "reasonableness," preexisting caselaw that has applied general law to specific circumstances will almost always be necessary to draw a line that is capable of giving fair and clear notice that an official's conduct will violate federal law.

Thomas, at 954 (citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

Further, in *Willingham v. Loughnan*, 321 F.3d 1299 (11th Cir. 2003), this Court accepted *certiorari* and remanded the case to the Eleventh Circuit for reconsideration of the decision to grant qualified immunity to the officers in light of *Hope*. *See Willingham*, at 1300. On remand, the Eleventh Circuit still found that the officers were entitled to qualified immunity. Significantly, the Eleventh Circuit's comments clearly illustrate its reluctance and/or refusal to comply with the specific mandate of *Hope*. The Eleventh Circuit noted that "[t]he Supreme Court in *Hope v. Pelzer* did not change the preexisting law of the Eleventh Circuit much." *Id.* In discussing qualified immunity, the Eleventh Circuit further noted:

> We have said that preexisting, factually similar cases are – not always, but (in our experience) usually – needed to demonstrate that officials were fairly warned that their application of force violated the victim's constitutional rights....
>
> The Supreme Court, in *Hope*, cautions against a "rigid gloss on the qualified immunity standard" that would require materially similar, preexisting cases in all circumstances when the qualified immunity defense is to be overcome." [Citation omitted]. Such a 'rigid gloss' would be in variance with the law of the Supreme Court and the law of this Circuit.

Id. at 1303.

Accordingly, it seems clear that the Eleventh Circuit continues to employ its long-standing method of analyzing qualified immunity claims which was specifically rejected in *Hope*. Critical to the Eleventh Circuit's decision that the officers were still entitled to qualified immunity after *Hope* in *Willingham* was the fact that it found no case with facts similar enough to put officers on notice that it was unreasonable to shoot an unarmed woman who had just assaulted them with kitchen utensils. *See id.* at 1304.

In *Willingham*, plaintiff alleged that police officers violated her Fourth Amendment rights by shooting her. *See Willingham* at 1301. In its opinion that reinstated its earlier finding that the police officers were entitled to qualified immunity, the Eleventh Circuit court again applied a flawed analysis:

> No general decisional rules applied with obvious clarity to these circumstances in such a way as to give

> fair notice that what these defendants were doing clearly violated federal law. And, as was the situation with our earlier decision, Plaintiff has pointed us to no case of the Supreme Court, Eleventh Circuit, or the Supreme Court of Florida which had already decided that the use of deadly force on a Plaintiff – (1) who had just attempted to murder one police officer and assaulted another, (2) who was not under police control, and (3) was close by a source of weapons – was unconstitutional.

Willingham, at 1304.

Again, the Eleventh Circuit required decisional law containing almost identical facts before finding the law clearly established, precluding qualified immunity. Therefore, it seems clear that the Eleventh Circuit is ignoring this Court's directive in *Hope* and still requiring cases with materially similar facts before determining that the law was clearly established.

In *Evans v. City of Zebulon*, 351 F.3d 485 (11th Cir. 2003) (Propst, D.J., concurring in part and dissenting in part), the Eleventh Circuit again employed the qualified immunity analysis which was expressly rejected by this Court in *Hope*. In *Evans*, the plaintiffs filed an action pursuant to 42 U.S.C. § 1983 alleging that police officers subjected them to improper strip and body cavity searches. The District Court denied the police officers' motion for summary judgment based on qualified immunity. *Id.* at 487. On appeal, the Eleventh Circuit reversed the findings of the District Court and held that the officers involved in the strip searches were entitled to qualified immunity. *See Evans*, at 486.

In *Evans*, the plaintiffs were college students who were stopped for speeding. After being stopped, the plaintiffs alleged that they were subjected to strip and body cavity searches, along with attendant verbal abuse that contained numerous racial slurs and epithets. *See id.* In its opinion granting qualified immunity, the Eleventh Circuit discussed a lengthy list of cases involving unconstitutional strip and body cavity searches from their own Circuit, other Circuits as well as Supreme Court decisions, in order to determine whether the officers were on notice that their conduct was unconstitutional.

Nevertheless, the Eleventh Circuit disregarded the majority of these opinions and found that the only relevant cases in their analysis were *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L. Ed.2d 447 (1979) and *Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992). Significantly, the District Court cited these cases as "clearly establishing that, absent reasonable suspicion, a strip search involving physical contact and use of an object to probe the subject's anal and genital areas was unconstitutional." *Id.* at 490. The Eleventh Circuit disagreed, stating:

> We readily conclude that there are no materially similar precedents that provided Stephens fair warning of the unconstitutionality of his conduct. The only two cases considering the manner in which a strip search was performed decided at the time of the searches at issue and which could have provided fair warning to Stephens are *Bell* and *Justice*. While the *Bell* Court cautioned that "on occasion a security guard may conduct the search in an abusive fashion," the Court provided no factual context to give definition to what constitutes an abusive search. *Justice* held that a strip search conducted in a

> minimally intrusive manner was reasonable, but did not indicate what might constitute an unreasonable search.

Id. at 494 (internal citations omitted).

The Eleventh Circuit explained its grant of qualified immunity as follows:

> While the appellees have alleged a search that a jury could conclude was unreasonably humiliating, degrading, and terrifying, the alleged conduct does not go "so far beyond the hazy border" between reasonable and unreasonable conduct that every reasonable officer would have to know that it violated the Constitution.

Id. at 496. (internal citations omitted).

This language demonstrates that the Eleventh Circuit continues to apply a pre-*Hope* qualified immunity analysis by requiring almost identical factual decisional law defining unconstitutional acts before it will deny qualified immunity to state actors.[2] If there is no such exact decisional law, the Eleventh Circuit will refuse qualified immunity only if the

---

[2] The Eleventh Circuit refuses to take into account law from other circuits, and state and local statutes and police regulations when determining whether the officer in question was on notice that his conduct was unconstitutional. *See Evans*, 351 F.3d 485, 494 n.15 (11th Cir. 2003) ("Only decisions of the Supreme Court, the Eleventh Circuit, and the highest court of the relevant state clearly establish the law for purposes of qualified immunity.") (citing *Marsh v. Butler County*, 268 F.3d 1014, 1032 n.9 (11th Cir. 2001) (*en banc*)).

acts alleged are so abusive that they clearly fall outside the "hazy border" of reasonableness. *See Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002). This analysis completely ignores this Court's directive in *Hope*.

It is significant to note that District Court Judge Propst, who was not a member of the Eleventh Circuit Court of Appeals but was sitting on the case by designation, filed a dissenting opinion. In his dissenting opinion, Judge Propst disagreed with the decision to grant the officers qualified immunity. In Judge Propst's opinion, the strip and body cavity search, along with the attendant verbal abuse and racially derogatory remarks, were "egregiously abusive" and "manifestly overreaching," such that any reasonable and competent officer would know that it was unreasonable and unconstitutional. *Id.* at 497. According to Judge Propst, the officers were provided with "fair notice" that their conduct was unconstitutional and, therefore, the officers were not entitled to qualified immunity.

Likewise, in *Vaughan v. Cox*, 316 F.3d 1210 (11th Cir. 2003), the Eleventh Circuit originally applied the qualified immunity analysis that was expressly rejected by *Hope*. In *Vaughan*, a passenger in a speeding vehicle who was struck by a bullet fired by a police officer during his attempt to stop the vehicle brought a 42 U.S.C. § 1983 lawsuit to recover for alleged constitutional violations. *See Vaughan* at 1211. In its first opinion, the Eleventh Circuit found that the conduct alleged could be found to violate the plaintiffs' constitutional rights, but granted the officer qualified immunity. *Vaughan*, 264 F.3d 1027, 1037 (11th Circuit 2001). Justice Noonan, of the Ninth Circuit who was sitting by designation, filed a dissenting opinion, arguing that the officer was not entitled to qualified immunity. *Id.* at 1038-1039.

After *Hope*, this Court accepted *certiorari* in *Vaughan*, vacated the Eleventh Circuit's opinion and remanded the matter to the Eleventh Circuit for reconsideration in light of *Hope*. On remand, the Eleventh Circuit again applied an excessively strict analysis and affirmed and reinstated its prior opinion. *Vaughan*, 316 F.2d 1210, at 1213. Again, Justice Noonan, sitting by designation, filed a dissenting opinion.

In arguing that officer was provided with "fair notice" that his actions in firing his weapon into a speeding car with unarmed passengers in order to execute a traffic stop amounted to an illegal seizure, plaintiff relied upon *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed. 1 (1985). In *Garner*, this Court held that it was unconstitutional to use deadly force to apprehend an unarmed, fleeing felon. *Id.* at 4. In applying this holding of *Garner* to the facts of *Vaughan*, it is perfectly clear that any reasonable officer would have "fair notice" that shooting at an unarmed suspect to execute a traffic stop is unconstitutional. However, the Eleventh Circuit found this analysis misplaced:

> Because the *Garner* rule, standing alone, does not apply with "obvious clarity" such that Deputy Cox was given fair warning that his alleged conduct was unconstitutional, we must consider whether, in light of *Hope*, the cases applying the *Garner* rule provided fair warning to Deputy Cox that his conduct violated Vaughan's constitutional rights...
>
> We conclude that prior decisions did not provide fair warning to Deputy Cox that his alleged conduct violated Vaughan's Fourth Amendment rights. Although the *Hope* decision can be read to invite Vaughan to offer analogous, though not necessarily factually identical, Fourth Amendment cases to show

> that the law was clearly established at the time of the shooting, Vaughan has failed to do so. Vaughan concedes that similar cases do not exist, (Vaughan Supp. Reply Br. at 5), and he cites only three cases--*Garner*, *Graham*, and *Acoff*--for the proposition that the law provided fair warning to Deputy Cox as of January 1998 that his conduct was unconstitutional. *Garner* and *Graham*, as noted above, establish general constitutional rules that do not apply with "obvious clarity" to the incident at issue in this case. *Acoff* was brought to our attention when this case was originally before us. *See Vaughan*, 264 F.3d at 1034. We conclude that *Acoff*, which involved a quite different factual circumstance and invalidated a general police policy that contravened the principles established in *Garner*, failed to provide fair warning to Deputy Cox that his application of deadly force violated the Fourth Amendment. *Acoff*, 762 F.2d at 1547-48.

Vaughan, at 1213.

Again, Justice Noonan filed a dissenting opinion, indicating:

> The petition for a writ of *certiorari* in this case was granted, and the judgment of this court was vacated. *Vaughan v. Cox*, --- U.S. ----, 122 S.Ct. 2653, 153 L.Ed.2d 830 (June 28, 2002). The case was remanded to us "for further consideration in light of *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)." *Hope v. Pelzer* had reversed another decision by the Eleventh Circuit Court of Appeals, 240 F.3d 975 (11th Cir.2001). That case had held that prison officials in Alabama would not be on notice that tying a prisoner to a hitching post for seven

hours, his back bare to the sun, his wrists tortured by handcuffs that swelled with the heat, while he was denied any release to urinate or defecate and was denied any water by a guard who gave water from a pitcher to a dog but spilled it on the ground before the prisoner, was cruel and unusual punishment. The Eleventh Circuit in *Hope* found the conduct of the prison officials unconstitutional but held that there were no cases with "materially similar facts" that would have put the officials on notice that their conduct was cruel and unusual. *Id.* at 981. Reversing the circuit court decision, the Supreme Court noted that the "focus in the case was the Eleventh Circuit's position that a violation is not clearly established unless it is the subject of a prior case of liability on facts 'materially similar' to those charged." The Supreme Court noted that the circuit court's decision "exposes the danger of a rigid overreliance on factual similarity." *Hope*, 122 S.Ct. at 2517. The Court went on to cite analogous binding Fifth Circuit precedents and to add: "The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." *Id.* at 2511.

Invited to give "further consideration" to Vaughan's case in the light of *Hope*, the majority comes to the same conclusion it reached before. The majority states: "Whether Deputy Cox had arguable probable cause, whether deadly force was necessary to prevent Vaughan's escape, and whether a warning was feasible in the instant case are all questions that the general *Garner* rule does not clearly answer." Op. at p. 789....

> I do not see how Cox's conduct, if so found, differed in any material respect from the conduct found to be unconstitutional in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). Surely it is not for this court to preempt the jury and resolve all material facts in dispute against Vaughan. *See Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272; *Behrens v. Pelletier*, 516 U.S. 299, 309, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). If, as the court has stated, these facts could be resolved in Vaughan's favor, then Cox was on notice that to shoot a fleeing felon without notice is a seizure in violation of the Fourth Amendment. As the dissent in our first consideration of this case suggested, it is difficult to discern why, if police officers in Tennessee and Minnesota and Connecticut were on notice that the use of lethal force to restrain a suspect is unreasonable, Georgia police officers should be supposed slow to have learned. *See Vaughan*, at 264 F.3d 1027 (dissent). Not only case law gave notice. Just as "the obvious cruelty" inherent in their actions gave "some notice" to the Alabama prison officials in Hope, so the obvious danger inherent in shooting into the occupied front seat of a car gave Cox "some notice" of the unconstitutional character of his alleged action.

Id. at 1214-1215

Based on this opinion in *Vaughan* and Justice Noonan's dissent, it is clear that the Eleventh Circuit again refused to apply the *Hope* "fair warning" or "fair notice' standard in determining whether the law is clearly established.

After the second opinion in *Vaughan*, plaintiff filed a second petition for writ of *certiorari* which was denied by this Court. Thereafter, the Eleventh Circuit inexplicably reversed itself *sua sponte*. In the Eleventh Circuit's third opinion, it denied the officer qualified immunity. *See Vaughan*, 343 F.3d 1323, at 1332-33. In reversing itself *sua sponte*, the Eleventh Circuit finally agreed that *Garner* provided the officer with "fair notice" that shooting an unarmed fleeing traffic offender was unconstitutional. While the Eleventh Circuit seems to have applied the proper qualified immunity analysis from *Hope* in its third opinion in *Vaughan*, the history of *Vaughan* and the other cases cited herein clearly indicate that the Eleventh Circuit has failed to accept or apply the holding of this Court in *Hope* consistently and uniformly.

Despite the admonition by this Court for the Eleventh Circuit to remove its "rigid gloss" on the qualified immunity analysis and to apply a common sense "fair notice" approach to determining what law is "clearly established," *see Hope* at 741, the Eleventh Circuit has repeatedly refused to do so. Under *Hope*, precedent precisely on point is unnecessary. Common sense is relevant to the inquiry about whether the contours of the right at issue were clearly established. Fair warning is all that is required.

The Eleventh Circuit's one sentence *per curiam* opinion reversing the District Court's well-reasoned opinion denying qualified immunity to Officer Hill completely ignores this Court's mandate in *Hope*. Given the hostility the Eleventh Circuit has shown toward this Court's mandate in *Hope* (as illustrated by the cases cited herein) and the failure of the Eleventh Circuit to provide any analysis in its one paragraph *per curiam* order reversing the District Court's well-reasoned opinion, Petitioners request that this Court to accept *certiorari* to compel the Eleventh Circuit to comply with *Hope*.

II. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), provided Officer Hill with "fair notice" or "fair warning" that his conduct during the course of a pursuit could violate the substantive due process rights of the Petitioners' children.

In *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), this Court discussed the right to recover under 42 U.S.C. § 1983 for substantive due process violations arising from police pursuits. In analyzing the claims in *Lewis*, this Court noted that the "denial of due process is to be tested by an appraisal of the totality of the facts in a given case." *Id.* at 1720. This Court held that "rules of due process are not, however, subject to mechanical application... [O]ur concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." *Id.* at 1718-19.

This Court noted that "[d]eliberate indifference which shocks in one environment may not be so patently egregious in another" and that the "deliberate indifference" standard is inappropriate when "deliberation" itself is not possible. *Id.* However, this Court noted that "[w]hen such extended opportunities to do better are teamed with protracted failure to even care, indifference is truly shocking." *Id.* at 1720. While adopting the "shocks the conscience" standard under the facts of *Lewis*, the Court expressly recognized that "[w]hether the point of the conscience shocking is reached when injuries are produced with culpability ... following from something more than negligence but less than intentional conduct, such as recklessness or gross negligence ... [is] a matter for closer calls." *Id.* at 1718. In its final analysis, this Court held that a pursuit with no intent to injure or worsen the

legal plight of the suspects is not actionable under 42 U.S.C. § 1983. *Id.* at 1720.

In *Lewis*, an officer commenced a pursuit of a motorcycle which refused to obey a command to stop. The pursuit lasted 75 seconds and covered a distance of 1.3 miles. Given the brief time and distanced covered by the pursuit, the officer in *Lewis* acted instinctively to an emergency situation and did not have the luxury to deliberate about his actions. In such a scenario, *Lewis* clearly precludes a finding that the officer's conduct rose to the level of a constitutional violation.

Under Officer Hill's interpretation of *Lewis* in the lower courts, no pursuit could rise to the level of a constitutional violation. However, Officer Hill's argument is undermined by *Lewis* itself. While finding that the conduct in *Lewis* did not rise to the level of a constitutional violation, this Court did provide some guidance with respect to conduct which would violate a citizen's constitutional rights during the course of a pursuit by citing with approval *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986).

In *Checki*, police officers in an unmarked car approached plaintiff's vehicle from behind at a high rate of speed. The plaintiff's vehicle fled from the unmarked police vehicle and a pursuit was commenced. During the course of this pursuit, the police officers activated their lights and sirens, but the plaintiff's vehicle refused to stop until faced with a roadblock. As a result of the pursuit, the plaintiff brought a substantive due process claim against the officers. The district court dismissed plaintiff's action pursuant to F.R.C.P. 12(b)(6). On appeal, the Fifth Circuit reversed, holding:

> Where a citizen suffers physical injury due to a police officer's negligent use of his vehicle, no Section 1983 claim is stated. *Cannon v. Taylor*, 782 F.2d 947, 948-50 (11th Cir. 1986). It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's intentional misuse of his vehicle. Factual development in this case could lead to a jury question whether [the officers'] car-chasing actions were "inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience." The trier of fact will have to determine whether [the officers] crossed the constitutional line that would make their pursuit harassment actionable under Section 1983.

Id. at 537-38.

Given that the facts of this pursuit are far more egregious than those in *Checki*, this Court should conclude that Officer Hill was provided with "fair notice" and "fair warning" that his conduct during the course of this pursuit could violate the constitutional rights of Petitioners' decedents. Therefore, according to *Hope*, this Court should hold that Officer Hill is not entitled to qualified immunity.

CONCLUSION

Based on the aforementioned argument and authority, the Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

Andrew C. Clarke
Counsel of Record
Bailey & Clarke
6256 Poplar Avenue
Memphis, Tennessee 38119
(901) 680-9777

C.S. Chiepalich
Law Office of C.S. Chiepalich
1860 Government Street
Mobile, Alabama 36606
(251) 478-1666

Attorneys for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case No. 03-10884-CC

[Filed December 12, 2003]

WANDA EVERS,	)
Individually, and as Administratrix	)
of the Estate of Jeffrey Bryan	)
Cubicke, deceased,	)
JOE R. GODWIN,	)
Individually, and as Administrator	)
of the Estate of Jessica Rose	)
Godwin, deceased, and as Administrator	)
of the Estate of Jeremiah Godwin,	)
KEITH DANIELS,	)
Individually, and as Administrator	)
of the Estate of Jonathan Christopher	)
Daniels, deceased,	)
Plaintiffs-Appellees,	)
	)
versus	)
	)
CITY OF GULF SHORES, ALABAMA,	)
et al.,	)
Defendants,	)
	)
MICHAEL HILL, Officer,	)
Defendant-Appellant.	)

_____)

On Appeal from the United States District Court for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19 ___, ____ F.2d ____) .

Before: TJOFLAT, BARKETT and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

Andrew Clarke
6256 Poplar Avenue
Memphis TN 38119-4713

December 12, 2003

RE: 03-10884-CC Wanda Evers v. City of Gulf Shores, AL DC DKT NO.: 00-01088 CV-CB-M

CC: Carroll H. Sullivan

CC: George M. Zoghby

CC: Frank L. Parker, Jr.

CC: Andrew Clarke

CC: Elizabeth Anne Citrin

CC: Administrative File

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case No. 03-10884

D.C. Docket No. 00-01088-CV-CB-M.

[Filed October 3, 2003]

[DO NOT PUBLISH]

WANDA EVERS,	)
	)
Individually, and as Administratrix	)
of the Estate of Jeffrey Bryan	)
Cubicke, deceased,	)
JOE R. GODWIN,	)
Individually, and as Administrator	)
of the Estate of Jessica Rose	)
Godwin, deceased, and as Administrator	)
of the Estate of Jeremiah Godwin,	)
KEITH DANIELS,	)
Individually, and as Administrator	)
of the Estate of Jonathan Christopher	)
Daniels, deceased,	)
Plaintiffs-Appellees,	)
	)
versus	)
	)
CITY OF GULF SHORES, ALABAMA, Et Al.,	)

Defendants,)
)
MICHAEL HILL, Officer,)
Defendant-Appellant.)
)

Appeal from the United States District Court for the Southern District of Alabama

(October 3, 2003)

Before TJOFLAT, BARKETT AND HILL, Circuit Judges.

PER CURIAM:

The Supreme Court's decision in County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998), requires us to hold that appellant is entitled to qualified immunity with respect to appellees' substantive due process claims. The district court's decision denying appellant qualified immunity on those claims is therefore

REVERSED.

United States Court of Appeals
For the Eleventh Circuit

No. 03-10884

District Court Docket No.
00-01088-CV-CB-M

[Filed October 3, 2003]

[Issued as Mandate December 22, 2003]

WANDA EVERS,)
Individually, and as Administratrix)
of the Estate of Jeffrey Bryan)
Cubicke, deceased,)
JOE R. GODWIN,)
Individually, and as Administrator)
of the Estate of Jessica Rose)
Godwin, deceased, and as Administrator)
of the Estate of Jeremiah Godwin,)
KEITH DANIELS,)
Individually, and as Administrator)
of the Estate of Jonathan Christopher)
Daniels, deceased,)
Plaintiffs-Appellees,)
)
versus)
)
CITY OF GULF SHORES, ALABAMA,)
Et Al.,)
Defendants,)
)
MICHAEL HILL, Officer,)
)

Defendant-Appellant,)
_____)

Appeal from the United States District Court for the Southern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered:	October 3, 2003
For the Court:	Thomas K. Kahn, Clerk
By:	Jackson, Jarvis

Andrew Clarke
6256 Poplar Avenue
Memphis TN 38119-4713

December 22, 2003

RE: 03-10884-CC Wanda Evers v. City of Gulf Shores, AL
DC DKT NO.: 00-01088 CV-CB-M

TO: Charles R. Diard Jr.

CC: Carroll H. Sullivan

CC: George M. Zoghby

CC: Frank L. Parker, Jr.

CC: Andrew Clarke

CC: Elizabeth Anne Citrin

CC: Hon. Bert W. Milling

CC: Administrative File

APPENDIX C

IN THE UNTIED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 00-1088-CB-M

[Filed February 10, 2003]

Joe R. Godwin, et al.,	)
Plaintiffs,	)
	)
vs.	)
	)
CITY OF GULF SHORES, ALABAMA, et al.,	)
Defendants.	)
	)

MEMORANDUM AND OPINION

This matter comes before the Court after granting Plaintiffs' Motion to Reconsider the Order Dismissing Plaintiffs' Claims Against Defendants Arthur Borne and Michael Hill in their individual capacities on qualified immunity grounds. Doc. 41. Both Officer Hill and Chief Borne have filed briefs in opposition. Docs. 44 & 45. For the following reasons, the Court finds that its previous Order granting qualified immunity to Officer Hill and Chief Borne should be **REVERSED** in part, and **AFFIRMED** in part.

FACTS

The Court reconsiders its previous Order in light of the recent Supreme Court ruling in *Hope v. Pelzer*, 122 S. Ct. 2508 (2002). For the purposes of reconsideration, the Court limits the factual narrative to the relevant issue of qualified immunity.[1] On July 16, 1999, at 3:14 a.m., Officer Michael Hill, who was driving a marked Gulf Shores Police Department vehicle, attempted to stop a pickup truck carrying five people for speeding. Doc. 25. Officer Hill had clocked the truck on radar traveling 60 miles per hour in a 45 miles per hour speed zone on Highway 59 within the Gulf Shores police jurisdiction. *Id.* Officer Hill then pulled in behind the truck and attempted to stop it for speeding. *Id.* However, rather than stopping, the truck headed north on Highway 59 with the police car giving chase. *Id.* Both vehicles passed through numerous intersections at high rates of speed. *Id.* Two of the truck's occupants, who were in the bed of the truck, were allegedly plainly visible to Officer Hill during the chase. *Id.* Officer Hill allegedly did not activate his lights and sirens during the pursuit. *Id.* The pursuit ended 25 miles and 15 minutes later when the pick-up truck collided with another vehicle. *Id.* All five passengers in the pickup truck were killed. *Id.*

The Court, in discussing qualified immunity, correctly stated that the determination is a two-step process. *Id.* at page 14. First, the defendant must prove that he was acting within the scope of his discretionary authority when the alleged wrongful conduct occurred. *Id. (citing Jordan v. Doe*, 38 F.3d 1559, 1565 (11th Cir. 1994)). The Court previously

---

[1] For an in-depth factual history see the Order dated March 28, 2002. Doc. 25.

found that Defendants Hill and Bourne were within the scope of their discretionary authority when they took the actions that gave rise to this lawsuit. *Id.* Thus, that finding will not be disturbed here because *Hope* does not speak to that issue. *See id.* at page 16. After finding Defendants to be acting in their discretionary capacity, the burden shifted to the Plaintiffs to demonstrate that the constitutional right or rights allegedly violated by Defendants were "clearly established." *Id.* Plaintiffs only attempted to demonstrate that the chase violated their clearly established Fourteenth Amendment substantive due process rights. *Id.* at pages 16-17. In holding that the Plaintiffs' rights were not clearly established because there were no cases that were "materially similar," the Court correctly followed Eleventh Circuit precedent. *Id.*

HOPE v. PELZER

However, this precedent was overturned by *Hope* which rejected a requirement that previous cases be "fundamentally similar." Qualified immunity serves to ensure that law enforcement officials receive fair warning that their conduct is unlawful before they are subject to suit. *Hope v. Pelzer*, 122 S. Ct. 2508, 2515 (2002).

> For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). The Supreme Court found that general statements of

law could provide fair warning even though the actions in question have not been found previously unlawful. *Id.* at 2516.

> '[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.'

Id. (*quoting Anderson*, 483 U.S. at 640).

The Supreme Court further stated that officials could even be on notice that their conduct violates established law "in novel factual circumstances." *Id.* Nonetheless, the Supreme Court added that cases involving fundamentally similar facts may be strong evidence that the law is clearly established, but quickly noted that similar factual cases are not necessary for such a finding. *Id.* The Supreme Court held that:

> [T]he salient question that the Court of Appeals ought to have asked is whether the state of the law [during the incident] gave respondents fair warning that their alleged treatment of [petitioner] was unconstitutional.

Id. Therefore, in determining whether Defendants' conduct violated clearly established law,[2] the Court must examine the

---

[2] "In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose.'" *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 827 n.4 (11th Cir. 1997) (en banc).

state of the law during 1999 to see if Defendants had fair warning that their actions were unconstitutional.

VINYARD v. WILSON

The Eleventh Circuit clarified it stance on qualified immunity in the wake of *Hope v. Pelzer*. *Vinyard v. Wilson*, 2002 WL 31521208 (11th Cir. Nov. 14, 2002). The circuit court found that after the defendant establishes that he was acting in the scope of his discretionary authority, then the burden shifts to the plaintiff to establish that qualified immunity is not appropriate. *Vinyard*, 2002 WL 31521208, at *4. The Eleventh Circuit found that as a threshold matter, courts must determine if plaintiff's allegations, if true, establish a constitutional violation. *Id. (citing Hope v. Pelzer*, 122 S. Ct. 2508, 2515 (2002)). Here, after ruling that the Defendants were acting in their discretionary capacity, the Court previously found that Plaintiffs' allegations, if true, constituted a violation of the Fourteenth Amendment, in the context of police chases. Doc. 25 at pages 5-7, 14-16.

The Eleventh Circuit stated that if a constitutional violation is found under the plaintiff's version of the facts, then the next step is to determine if the right was clearly established. *Vinyard*, 2002 WL 31521208, at *4. The circuit court outlined three scenarios which would give the defendants "fair and clear notice" that their conduct is unlawful. *Id.* at *6-9. First, in some instances, the words of a federal statute or constitutional provision will be specific enough, even in the total absence of case law, to clearly establish the law applicable to particular conduct and circumstances. *Id.* at *7. Second, "some broad principles in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts." *Id.* Finally, in order to find clearly established

law, courts may look at controlling precedent "that is tied to the facts." *Id.* The circuit court noted that most judicial precedents fall into the latter category. *Id.*

The Defendants' actions here do not fall into the first category because there are no federal statutes or constitutional provisions that, in the absence of case law, clearly establish the law applicable to high-speed police chases. Likewise, the Court has previously found that Defendants' actions do not qualify for the third category because there are no materially similar cases on point from controlling authority. Doc. 25 at pages 14-18. Thus, the Court now turns to the second category to determine if there are broad statements of case law that are applicable here to put Defendants on notice that their conduct was unlawful.

CLEARLY ESTABLISHED LAW

Of course, the seminal case on high-speed police chases and the deprivation of constitutional rights is *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). The Supreme Court held that a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death in a high-speed automobile chase aimed at apprehending a suspected offender only when the officer's "purpose to cause harm [is] unrelated to the legitimate object of arrest[.]" *Lewis*, 523 U.S. at 836. In *Lewis,* the officer observed a motorcycle with two riders speeding towards him. *Id.* The motorcycle evaded the hastily-erected roadblock set up by the police officer and the officer gave chase at a high speed. *Id.* at 836-37. The chase lasted seventy-five seconds, spanned about 1.3 miles, and reached speeds up to 100 miles an hour. *Id.* at 837. The motorcycle tipped over while making a turn and the police car was unable to stop before running over and killing one of the riders. *Id.*

The Supreme Court noted that during a high-speed chase a police officer has conflicting obligations: restoring and maintaining order while not exacerbating disorder more than necessary; acting decisively and showing restraint at the same time; and weighing the need to stop a suspect against the potential threat of the high-speed to chase to others, including the suspects. *Id.* at 853. The Supreme Court observed, "[P]olice officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving[.]" *Id.* (*quoting Graham v. Conner*, 490 U.S. 386, 397 (1989)). Thus, in light of the real world practicalities that are involved in high-speed police chases, the Supreme Court held that a purpose to cause harm is needed for due process liability. *Lewis*, 523 U.S. at 853-54.

> [W]e hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment[.]

Id. at 854. Using the "intent to harm" standard, the Supreme Court found that the officer's conduct did not meet the "shock-the-conscience" test. *Id.* The Supreme Court remarked that the police had done nothing to cause the motorcycle to speed in the first place, and nothing to encourage the motorcycle to race through traffic at a high speed. *Id.* at 855. "While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce [plaintiff's] lawlessness, or to terrorize, cause harm, or kill. *Id.*

The Eleventh Circuit grappled with the issue of qualified immunity in the context of a police vehicle running into and killing a bystander. *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). In *Cannon,* the police officer was responding to

a disturbance at a pool hall. *Cannon*, 782 F.2d at 948. The police officer increased his speed to 46 miles per hour in a 30 miles per hour zone. *Id.* The officer, contrary to state law, was not employing his flashing lights or sirens while speeding. *Id.* The officer struck and killed the driver of another car that was crossing an intersection. *Id.* The Eleventh Circuit held that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no section 1983 cause." *Id.* at 950. *See also Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996) (affirming the granting of qualified immunity of police officer who was negligent while speeding in the absence of an emergency response or police pursuit).

DISCUSSION

It is clear from established law that negligence will not give rise to a substantive due process claim under the Fourteenth Amendment. *See Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). Furthermore, it is equally clear that when the purpose of the officer giving chase at a high rate of speed is to cause harm, then it is a violation of the substantive due process component of the Fourteenth Amendment. *See County of Sacramento v. Lewis*, 523 U.S. 833 (1998). There is certainly no direct evidence that Defendants intended to cause harm to Plaintiffs that was unrelated to the legitimate object of arrest. There are no remarks attributed to Defendants about how the purpose of the high speed chase was to harm Plaintiffs. However, as in any legal matter, direct evidence can be difficult to come by.

Officer Hill

Thus, the Court looks to circumstantial evidence in order to infer any intent to harm. In the light most favorable to the non-movant, Plaintiffs' only violation was exceeding the speed limit by 15 miles per hour. There was no indication that Plaintiffs posed a threat to the community with their vehicle, such as being under the influence of alcohol or drugs, or fleeing from the scene of a crime. Of course, the plaintiffs in *Lewis* were only speeding and nothing more when the officer gave chase. *See Lewis*, 523 U.S. at 836-37. There is no magic number on the speedometer that the needle must pass in order to allow a police officer to give chase without looking over his shoulder for a constitutional violation. If police officers have probable cause to believe that a speeding violation has occurred, then they have the full legal authority to make a stop no matter if the violation is by one mile per hour or one hundred miles per hour over the speed limit. *See United States v. Purcell*, 236 F.3d 1274, 1276 (11th Cir. 2001). Thus, without more, attempting to pull over a speeding motorist does not lead to the conclusion that Officer Hill intended to harm Plaintiffs.

On the other hand, the sole fact that Officer Hill was not flashing his lights and using his sirens may lead to the conclusion that he intended to harm Plaintiffs. Lights and sirens are intended, in part, to give people notice and warning about a potentially hazardous situation, such as a police car giving chase to another vehicle at a high rate of speed. *See Cannon*, 782 F.2d at 948. Even though Officer Hill did not have his lights and sirens on, Plaintiffs were obviously aware that they were involved in a dangerous situation. Furthermore, Plaintiffs were aware that it was in fact a police officer giving chase due to Officer Hill's marked police car. Also, the streets and highways were most likely desolate at

the time of night that the chase was occurring, thus minimizing any danger to bystanders. However, the Court previously noted that absence of lights and sirens may lead the jury to "reasonably conclude that either the pursuit was not aimed at apprehending a suspect or that there was intent to cause harm or to worsen the legal plight of the automobile's driver." Doc. 25 at page 7. Thus, alone, the absence of lights and sirens could evidence a purpose to harm.

The length of the chase does not automatically transform an officer's legitimate object of arrest into an intent to harm. While it is true that Officer Hill had twenty-five minutes to consider his actions, he was in the heat of the chase and did not have the luxury to take a step back and consider all the possible ramifications of the chase outside the immediate safety of himself, Plaintiffs, and the community at large. Officer Hill could not stop giving chase to think about all of the potential safety hazards, then resume the chase once he had weighed all the possible factors in deciding the issue. Officer Hill either recognized the threat to safety during the chase or he did not. The length of the chase, while giving Officer Hill more time to recognize the safety issue, does not necessarily lead to the conclusion that Officer Hill intended to harm Plaintiffs.

Nevertheless, the Court finds the assumed fact that Officer Hill witnessed two people in the bed of the truck during the chase very disturbing. Officer Hill allegedly initially signaled for the truck to pull over because of a speeding violation, but did not activate his lights or sirens. Notwithstanding, the driver of the truck did not pull over, but attempted to flee after leaving the jurisdiction of the Gulf Shores Police Department. In the light most favorable to Plaintiffs, Officer Hill, during the chase, did observe the license plate of the truck. Thus, Officer Hill had sufficient information to arrest

the driver at a later time since the vehicle was not reported stolen. However, the Court recognizes that it is indeed preferable for a police officer to stop a motorist immediately after a speeding violation has occurred. For instance, a driver, who is not immediately pulled over, could at a later date claim not to have been driving the speeding vehicle.

Nonetheless, the need to effect a stop for a speeding violation must yield in the presence of safety concerns. For the purposes of this Order, Officer Hill observed two passengers in the bed of the speeding truck who were unwilling participants in the chase. Obviously, the driver has voluntarily chosen to put himself in a dangerous situation by not pulling over, but the same cannot be said for his passengers. The two passengers in the bed of the truck may not have been able to effectively communicate their desire for an end to the chase to the driver. Thus, those two passengers were faced with a harrowing twenty-five minute ride in the back of the truck that covered almost half of Baldwin County even after Officer Hill had gathered enough information to make a proper arrest of the driver at a later date.

It is difficult to see how the chase was related to the legitimate object of arrest of the driver when Officer Hill had gathered enough information to effect an arrest at a later time, yet continued pursuit without lights or sirens after he recognized the grave danger that the chase posed to the passengers in the bed of the truck. The Court concludes that the evidence infers that Officer Hill's intent was to cause harm to Plaintiffs. In finding that conclusion, the Court considers Officer Hill's actions to shock the conscience under the "intent to harm" standard set forth in *Lewis*. Thus, the Court finds that, pursuant to *Lewis*, Officer Hill received fair warning that his actions violated clearly established law. Therefore, the Court concludes that Officer Hill is not entitled

to receive qualified immunity as to the federal law claims based on the Fourteenth Amendment asserted against him in his individual capacity.

The Court adds that this holding in no way gives criminals a license to escape police pursuit by putting a person in the bed of a truck. The holding of the case is strictly on the limited facts before the Court because it appears that Officer Hill intended to harm Plaintiffs. Police should normally not be wary in such situations as giving full chase to vehicles that are stolen; driven by dangerous individuals; or involve any other numerous factual patterns. Courts should also normally defer to the judgment of the police in these situations.

Chief Bourne

While Officer Hill is not entitled to qualified immunity, Plaintiffs have not carried their burden to show that Chief Bourne's conduct violated their clearly established constitutional rights. In their brief, Plaintiffs rely almost solely on *Lewis* and *Cannon*, neither of which casts any illumination on Chief Bourne's conduct, since he did not participate in the high-speed chase. *See* Doc. 49. Plaintiffs admit that Chief Bourne did not monitor or supervise the chase. Doc. 49 at page 10. Furthermore, Plaintiffs concede that Chief Bourne conveyed the legal ramifications concerning high-speed pursuits to his officers, and that such pursuits could be in violation of the Gulf Shores Police Department's policy. *Id.* at pages 9-13. In short, none of Chief Bourne's actions, in the context of the actual chase itself, shock the conscience.

Plaintiffs' allegations regarding Chief Bourne's supposed violation of their rights under the Fourteenth Amendment appear to rest on the basis of respondeat superior. However,

there is no respondeat superior liability under 42 U.S.C. § 1983. *Monell v. Department of Social Servs. of City of New York*, 436 U.S. 658, 694-95 (1978). Thus, because Plaintiffs have not cited any legal precedent which gives Chief Bourne notice that his alleged failure to train or supervise Officer Hill violated clearly established law, the Court holds that Chief Bourne is entitled to qualified immunity from suit based on the violation of Plaintiffs' Fourteenth Amendment substantive due process rights.

CONCLUSION

It is clearly established law that a law enforcement officer violates a person's rights under the substantive portion of the Due Process Clause of the Fourteenth Amendment when his or her purpose during a high speed chase is to cause harm unrelated to the legitimate object of arrest. Thus, Officer Hill was on notice that his actions could result in civil liability. However, Chief Bourne did not have fair warning that his alleged failure to train or supervise could lead to civil liability. Therefore, Chief Bourne is entitled to qualified immunity on the claims asserted against him in his individual capacity, while Officer Hill is not entitled to qualified immunity on the claims asserted against him in his individual capacity.

ORDER

In light of the foregoing, the Court finds that the previous Order granting qualified immunity should be **REVERSED in part** concerning Officer Hill, and **AFFIRMED in part** concerning Chief Bourne.

DONE this the 10th day of February, 2003.

/s/_____

CHARLES R. BUTLER, JR.
CHIEF DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 00-1088-CB-M

[Filed March 28, 2002]

JOE GODWIN, etc., et al., Plaintiff,	)
v.	)
CITY OF GULF SHORES, ALABAMA, et al., Defendants.	)

ORDER

The defendants in this action have filed a joint motion to dismiss plaintiffs' Amended Complaint for failure to state a claim. After reviewing the Amended Complaint, defendants' motion to dismiss and supporting brief (Docs. 20 & 21), plaintiffs' opposition (Docs. 22 & 23) and defendants' reply (Doc. 24), the Court finds that the motion is due to be granted, in part, and denied, in part.

Facts[1]

This case arises from a terrible tragedy that took place in the early morning of July 16, 1999, when the driver of a pickup truck carrying four passengers led police on a high-speed chase that ended with a collision, resulting in the death of all five of the truck's occupants. At approximately 3:14 a.m., Officer Michael Hill, one of the defendants in this action, attempted to stop the pickup truck for speeding. Hill, who was driving a marked Gulf Shores Police Department vehicle, had clocked the truck on radar driving 60 mph in a 45-mph speed zone on Highway 59 inside the Gulf Shores police jurisdiction. David Sanford, the driver, Jeremy Ruben Godwin and Jeffrey Bryan Cubicke were in the cab of truck. Two additional passengers, Jessica Rose Godwin and Jonathan Christopher Daniels, were riding in the bed of the pickup, where they were plainly visible to Officer Hill.

Rather than stopping, the truck turned off Highway 59 and headed west through the Bon Secour community. The truck subsequently turned north and headed through the city of Foley, with Hill in close pursuit. Plaintiffs allege that Hill was not using his emergency lights and sirens during the pursuit.[2] Both the truck and Officer Hill's vehicle were

---

[1] These facts are set forth in the light most favorable to the plaintiffs.

[2] The Amended Complaint is somewhat contradictory on this point, as is demonstrated by the following factual allegations: "Hill alleges he activated his blue emergency lights." (Am. Compl ¶ 13(d).) "Officer Hill failed to continuously utilize [his] lights and sirens." (Id. ¶ 13(l).) "Officer Hill failed to engage emergency equipment during the pursuit." (Id. ¶ 13(m).) A plaintiff may allege contradictory facts if he has a good faith basis for doing so. American Internat'l Adjustment Co..v. Galvin, 86 F.3d 1455, 1461

traveling at high rates of speed, often passing through intersections without slowing down. Two officers from the Foley Police Department joined in the pursuit for a time but were eventually ordered by a superior to discontinue their efforts. The pursuit ended in nearby Robertsdale when the truck collided with another vehicle at an intersection. In all, the pursuit covered 25 miles and lasted approximately 15 minutes. According to the complaint, the manner in which the pursuit was conducted violated numerous policies of the Gulf Shores Police Department.

The complaint points to two separate acts by Gulf Shores officials as evidence of an attempt to cover up of the incident. First, according to plaintiffs, Officer Hill alleged that he saw bags or baggies being thrown from the truck during the pursuit. Officers from the Foley Police Department looked for such evidence but found nothing. When Gulf Shores police officers searched the same area, they found baggies of marijuana. Plaintiffs contend that members of the Gulf Shores Police Department manufactured evidence to justify Hill's actions. The second allegation of cover up involves questions surrounding the existence or non-existence of a videotape of the pursuit. Immediately after the incident Gulf Shores officials informed the news media that the pursuit had been captured on video by a camera in Officer's Hill's patrol car. Later, however, city officials denied the existence of a video and have failed to produce any video for plaintiffs' inspection.

(7th Cir. 1996). For reasons that will become obvious in the analysis of plaintiffs' claims, to view the evidence in the light most favorable to the plaintiffs the Court must presume that the lights and sirens were not activated during the pursuit.

Procedural Background

In response to plaintiffs' initial complaint, defendants filed a motion to dismiss on grounds essentially identical to the grounds raised here. Upon review of the plaintiffs' complaint, the Court concluded that it violated the Eleventh Circuit's admonition against "shotgun pleadings." Consequently, the Court did not rule upon the motion to dismiss but, instead, required plaintiffs to file an amended complaint. Plaintiffs have complied with the Court's order and have cured the pleading deficiencies noted in the original complaint. The Amended Complaint is the subject of the motion to dismiss now under consideration.

Plaintiffs Joe R. Godwin, Keith Daniels and Wanda Evers, filed the Amended Complaint both on behalf of themselves and in their representative capacities as administrators of the estates of their deceased minor children. Joe Godwin is the father of decedents Jessica Rose Godwin and Jeremiah Godwin. Keith Daniels is the father of decedent Jonathan Christopher Daniels. Wanda Evers is the mother of decedent Jeffrey Bryan Cubicke. The Amended Complaint names as defendants the City of Gulf Shores, Alabama, Gulf Shores Police Chief Arthur Bourne and Gulf Shores Police Officer Michael Hill.

Plaintiffs assert ten causes of action arising from the accident and alleged cover-up. Some of these claims are asserted by plaintiffs in their representative capacities on behalf of their children's estates; others are asserted by plaintiffs in their individual capacities. Plaintiffs' federal law claims allege various constitutional violations actionable under 42 U.S.C. § 1983. Counts I and II arise from the police pursuit and assert claims only against Officer Hill. Plaintiffs allege that defendant Hill violated the decedents' Fourteenth

Amendment due process rights by the manner in which he conducted the pursuit (Count I) and that the same conduct violated the decedents' Fourth Amendment right to be free from unreasonable seizure (Count II). Count III, which also arises from the pursuit, is an individual capacity claim against Hill for an alleged violation of plaintiffs' Fourteenth Amendment right to familial association with their children. Count IV is also an individual capacity claim but, unlike the foregoing claims, is asserted against all defendants and does not arise from the pursuit itself. Instead, plaintiffs allege that certain actions taken by the defendants impeded plaintiffs' ability to seek redress for the deaths of their children in violation of plaintiffs individual due process rights under the Fourteenth Amendment. Count V is a representative capacity claim against Chief Bourne and the City of Gulf Shores and alleges that these defendants are liable for the constitutional deprivations asserted in Counts I and II because those deprivations were caused by a custom, policy or practice of the Gulf Shores Police Department.

Counts VI through X allege violations of the constitution and the common law of the state of Alabama. Specifically, Counts VI and VII assert state constitutional violations against defendant Hill. Count VIII asserts a state constitutional violation against Chief Bourne and the City of Gulf Shores. Count IX alleges that all defendants negligently caused the death of plaintiffs' decedents, while Count X alleges that defendant Hill caused the death of plaintiffs' decedents intentionally, willfully, wantonly and in bad faith.

Standard of Review

"A motion to dismiss is only granted when the movant demonstrates 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief.'" Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, (1957)). For purposes of a motion to dismiss, the Court must accept all the allegations of the complaint as true and construe the facts asserted in light most favorable to the plaintiff. Former v. Thomas, 983 F.2d 1024, 1028 (11th Cir. 1993).

Section 1983 Claims

Issues Presented

The predominant question is whether the facts alleged are sufficient to support the constitutional violations asserted in Counts One through Four. If no constitutional violation is alleged, defendants argue, then Count Five must also be dismissed because there can be no municipal or supervisory liability under § 1983 without an underlying constitutional violation. Individual defendants, Officer Hill and Chief Bourne, alternatively argue that they are entitled to qualified immunity from claims against them in their individual capacities, even if the facts alleged would otherwise entitle plaintiffs to recover for a constitutional violation.

Police Pursuit/Fourteenth Amendment Due Process Claim

The seminal case on constitutional violations arising from police pursuits is County of Sacramento v. Lewis., 523 U.S. 833 (1998), which resolved a split among the circuits as to the level of culpability necessary to sustain a constitutional claim in police pursuit cases. In Lewis a police offer had attempted to stop a motorcycle for a traffic violation. When he did so, the driver of the motorcycle sped up, and the officer gave chase. The pursuit reached speeds of over 100 mph in a

residential neighborhood but lasted only a couple of minutes. It ended when the motorcycle crashed, and the police car, unable to stop, ran over and killed the motorcycle's passenger. The suit was brought by the family of the deceased passenger. Initially, the Court was required to decide whether the right allegedly violated arose from the Fourth Amendment's right to be free from unreasonable seizure or from more general substantive due process rights provided by the Fourteenth Amendment. Because it found no seizure occurred in the context of a police pursuit, the Court concluded that the Fourteenth Amendment provided the appropriate analysis. Id. 523 U.S. at 844.

Not only did Lewis identify the Fourteenth Amendment as the specific source for the alleged constitutional violation in this case, it also established the degree of fault and provided a bright-line test for determining culpability. Lewis rejected the deliberate indifference standard applied by the court below and, instead, held that liability may be imposed only if the defendant's conduct amounted to arbitrary government action that "shocks the conscience." Lewis, 523 U.S. at 846. The Lewis court went even further, explaining the level of proof necessary to meet the "conscience-shocking" test in the context of a high-speed police pursuit. According to Lewis, a Fourteenth Amendment violation occurs "in a high-speed automobile chase aimed at apprehending a suspect" only if "there was an intent to harm [the] suspects physically or to worsen their legal plight." Id. at 836, 854.

The facts alleged in the Amended Complaint viewed in the light most favorable to the plaintiff distinguish this case from Lewis. Lewis did not rule out the possibility that a police officer could be found liable even under intent-to-harm standard for the intentional misuse of his vehicle during a high-speed pursuit. In adopting intent-to-harm standard, the

Court cited, in a footnote, Checki v. Webb, 785 F.2d 534, 538 (5th Cir. 1986), for the proposition that liability may result from a police officer's intentional misuse of his vehicle. Lewis 523 U.S. at 854 n.13.

In Checki, state troopers in civilian clothes driving an unmarked car began to tailgate the plaintiff's car, forcing Checki to take evasive action. The troopers followed Checki at speeds up to 100 miles per hour, continuing to tailgate at times, for a distance of 20 miles before finally turning on their grill lights and sirens. The Fifth Circuit held that a police officer's "use[ ] [of] a police vehicle to terrorize a civilian... [is] [a] malicious abuse of official power shocking to the conscience." Checki, 785 F.2d at 538. Here, the complaint can be read to assert that Officer Hill did not activate his emergency lights and sirens. If that fact is proven true, then a factfinder might reasonably conclude that either the pursuit was not aimed at apprehending a suspect or that there was an intent to cause harm or to worsen the legal plight of the automobile's driver.[3]

---

[3] The parties' briefs have addressed the 14th Amendment/pursuit issue somewhat differently. Defendants do not acknowledge plaintiffs' allegations regarding Hill's failure to utilize lights and sirens. Hence, they argue that Lewis and its progeny preclude an inference of intent to harm based on the circumstances of a lawful pursuit. In response, plaintiffs do not clearly articulate the facts upon which they rely, but appear to contend that Lewis would permit recovery even if the emergency equipment had been activated due to the length of the pursuit and the obvious danger to the passengers in the rear of the pickup truck. At this juncture, the Court expresses no opinion as to whether those facts would support a claim under the Fourteenth Amendment.

Police Pursuit/Fourth Amendment Seizure Claim

In response to the motion to dismiss, plaintiffs concede that they cannot establish a Fourth Amendment claim under present law. Indeed, the Supreme Court's decision in Lewis foreclosed application of the Fourth Amendment in the context of a police pursuit. The Lewis court was required to decide whether the right allegedly violated by the police pursuit in that case arose from the Fourth Amendment's right to be free from unreasonable seizure or from more general substantive due process rights provided by the Fourteenth Amendment. Because it found no seizure occurred in the context of a police pursuit, the Court concluded that the Fourteenth Amendment, not the Fourth Amendment, provided the appropriate analysis. Lewis, 523 U.S. at 844.

Police Pursuit/Right to Familial Association/Fourteenth Amendment Due Process

In Count III, plaintiffs allege that by causing the deaths of their children defendant Hill violated their rights as parents to the familial association of their children. The Supreme Court has recognized the existence of a Fourteenth Amendment liberty interest in certain familial rights. "These precedents fall generally into two categories... [a] substantive due process [protection against]... governmental interference in 'certain particularly private family decisions. ... [and] [a] substantive due process cause require[ment] [of] strict adherence to procedural protections whenever the 'state seeks to change or affect the relationship of parent and child in furtherance of a legitimate state interest...'" Manarite v. City of Springfield 957 F.2d 953,960 (1st Cir. 1992) (quoting Ortiz v. Burgos, 807 F.2d 6, 8 (1st Cir. 1986)). In Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994), the First Circuit noted that the Supreme Court had never extended due process

protection "to claims based on governmental action which affects the family relationship only incidentally." Id. at 805.

Most courts that have confronted the issue have rejected substantive due process claims in such circumstances. E.g., Shaw, 13 F.3d at 804 (no substantive due process claim for loss of love and support of husband and father allegedly killed as result of police officer's use of excessive force); Harpole v. Arkansas Dept. of Human Services, 820 F.2d 923,928 (8th Cir. 1987) ("[p]rotecting familial relationships does not necessarily entail compensating relatives who suffer a loss as a result of wrongful state conduct, especially when the loss is an indirect result of that conduct"); Ortiz, 807 F.2d at (beating death of plaintiffs' son by prison guards did not give rise to § 1983 claim based on 14th Amendment liberty interest); see also Helleloid v. Independent School Dist. Number 326, 149 F.Supp.2d 863 (D. Minn. 2001) (parents' liberty interest in companionship of their child not violated by school officials' acts of fraud that prevented parents from protecting their child from sexual molestation); Willard v. City of Myrtle Beach, 728 F.Supp. 397 (D.S.C. 1989) (parents' liberty interest not violated by city's negligent detention of minor son); cf. Harbury v. Deutch, 233 F.3d 596 (D.C. Cir. 2000) (alleged murder of plaintiff's husband had only indirect affect on spousal relationship and therefore did not give rise to Fourteenth Amendment claim), cert. granted sub nom., Christopher v. Harbury, 122 S.Ct. 663 (Dec. 10, 2001).[4]

---

[4] Although plaintiffs suggest that the issue is currently under consideration by the Supreme Court in Harbury, the Court has reviewed the briefs filed by the petitioner in that and it appears that certiorari was granted on a completely different issue, *i.e.*, whether withholding of information by government officials about the captivity of her husband at the hands of a foreign government stated

There is, however, contrary authority upon which plaintiffs rely in support of their familial association claims. In Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984), the Seventh Circuit held that a father could recover under § 1983 for violation of his Fourteenth Amendment liberty interest in his relationship with his son who was killed by police as they attempted to arrest him. Bell is not persuasive, however, because the Seventh Circuit admittedly relied upon nothing other than the Supreme Court's general recognition of the existence of a liberty interest in the parent-child relationship.[5] No Supreme Court case before or after Bell has interpreted the liberty interest in familial relationships so broadly. Moreover, in more recent years the Supreme Court has been increasingly reluctant to expand the concept of substantive due process. See Washington v. Glucksburg, 521 U.S. 702, 720 (1997) ("We must exercise the utmost care whenever we are asked to break new ground in this field lest

---

a cause of action for denial of the constitutional right to access to courts. See Petitioner's Brf., 2002 WL 200675 (Jan. 24, 2002).

[5] Plaintiffs have cited three cases in addition to Bell, none of which is persuasive. 502 F.2d 488 (8th Cir. 1974); reversed and remanded the district court's dismissal of a father's § 1983 claim arising from the death of his son. The Eighth Circuit's en banc opinion on appeal after remand makes clear that the court viewed the father's substantive due process claim as a derivative one, holding that "[the] right encompasses the right of the appellant to raise the issue of his son's right to life." Mattis v. Schnarr, 547 F.2d 1007, 1017 (8th Cir. 1976) (en banc), vacated on other grounds, 431 U.S. 171 (1977). Jones v. McElroy, 429 F.Supp. 848 (E.D. Pa 1977), relies on almost solely on Mattis and, for that reason, is equally unpersuasive. Finally, the Court has examined Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981) and has found nothing in that court's reasoning that would cause this Court to abandon more recent federal authority to the contrary.

the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (liberty interest will only be recognized where right is fundamental and rooted in history and tradition).

In light of the recent hesitance to expand the scope of due process, the reasoning of the First, Fourth and Eighth Circuits discussed above more is persuasive than Bell. Therefore, the Court finds that plaintiffs' claim for deprivation of their right to familial association is due to be dismissed.

Cover-up/Denial of Right of Access to Courts/14th Amendment Due Process

Plaintiffs assert that their Fourteenth Amendment due process rights were also violated by a cover-up perpetrated by the defendants. The cover-up allegations are based on two separate incidents. The first is defendants' failure or refusal to turn over a videotape of the pursuit which plaintiffs allege must have been made by the camera in Officer Hill's patrol car. The second is the defendants' alleged "manufacturing," of evidence, *i.e.*the baggies of marijuana, to justify Officer Hill's conduct during the course of the pursuit. Neither of these incidents gives rise to a due process claim.

The Fourteenth Amendment's Due Process Clause has been held to guarantee citizens a right of access to the courts. See, e.g., Bounds v. Smith, 430 U.S. 817 (1977); Wolff v. McDonnell, 418 U.S. 539 (1974); Ex Parte Hull, 312 U.S. 546 (1941). A few cases have extended this right to apply when state officials have concealed a plaintiffs' cause of action, and it is on these cases plaintiffs rely. In Bell v. City of Milwaukee, 746 F.d2 1205 (7th Cir. 1984), the Milwaukee police department had covered up the fact that plaintiffs'

decedent had been murdered by the police in the early 1960's. In 1965, before the cover-up was revealed, the decedent's father had settled a wrongful death suit against the city for a small sum of money because there was evidence that the police officer had killed the decedent in self-defense. Years later, the cover-up was revealed and the decedent's family instituted a civil rights action against the police department. The Seventh Circuit held that the cover-up interfered with the family's right to seek redress, particularly with the father's earlier wrongful death action. Bell, 746 F.2d at 1262.

Ryland v. Shaviro, 708 F.2d 967 (5th Cir. 1983), another case upon which plaintiffs rely, involved a cover-up by state prosecutors who refused to allow an autopsy of plaintiffs' deceased daughter. As a result, plaintiffs did not learn that their daughter had been murdered until eleven months later. The Fifth Circuit held that the plaintiffs had stated cause of action by alleging that "the state intentionally engaged in conduct that interfered with their exercise of their constitutionally protected right to institute a wrongful death suit." Ryland, 703 F.2d at 973.

Later cases have cast doubt on the extent to which Ryland and Bell may be applied. The Fifth Circuit subsequently limited its holding in Ryland, which had formed the basis for the Seventh Circuit's decision in Bell. Rejecting the argument that "a government cover-up of evidence violates the right of access, even if suit is successfully instituted," the court "question[ed] Bell's reliance on Ryland for any broader definition of right of access than one encompassing the right to institute suit." Foster v. City of Lake Jackson, 28 F.3d 425,430 m7 (5th Cir. 1994). The right of access is "implicated where the ability to file suit was delayed, or blocked altogether." Id. at 430; see also Wilson v. Meeks, 52 F.3d

1547, 1557 (10th Cir. 1995) (recognizing limitation on Ryland and Bell imposed by Foster).

Here, the Amended Complaint contains no factual allegations to support a conclusion that the defendants' alleged cover-ups actually delayed or interfered with plaintiffs' ability to file suit. Unlike the plaintiffs in Bell or Ryland, the plaintiffs in this case knew the facts giving rise to their cause of action-there was a police chase in which their decedents were killed. The fact that the chase may have been captured on a videotape that may have been destroyed or withheld from them has not interfered with their ability to file suit. Neither is there any allegation to suggest that the ability to institute this action was thwarted by the evidence that was allegedly "planted" by the Gulf Shores.

The facts alleged in plaintiffs' Amended Complaint do not support a claim for denial of access to courts. Therefore, Count IV is due to be dismissed.

Supervisory/Municipal Liability

Defendants Bourne and the City of Gulf Shores argue that they cannot be held liable under the concepts of supervisory or municipal liability due to the absence of any underlying constitutional violation. This argument is, of course, premised on the success of the motion to dismiss plaintiffs' constitutional claims asserted in Counts I through IV. The Court agrees that plaintiffs cannot maintain a cause of action against Bourne of the City where no underlying constitutional violation has been asserted. See Rooney v. Watson, 101 F.3d 1378, 1381 (11th Cir. 1996) (no need to inquire into custom or policy claim against county where deputy's conduct did not

cause constitutional deprivation).[6] Consequently, these defendants cannot be found liable for any violation of the Fourth Amendment right to be free from unreasonable seizure (the underlying violation arising from Count II).[7] However, because plaintiffs have asserted an underlying Fourteenth Amendment violation for deprivation of substantive due process (arising from Count I), their claim for supervisory/municipal liability states a claim for relief.

Qualified Immunity

In Lassiter v. Alabama A & M University, 28 F.3d 1146 (11th Cir. 1994) (en banc), the Eleventh Circuit set forth the guiding principles of qualified immunity:

> Qualified immunity protects government officials performing discretionary functions from civil trial (and other burdens of litigation, including discovery) and from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S.Ct. 2727, 2738, 114 L.Ed.2d 277 (1991) ...

---

[6] Plaintiffs rely on Fagan v. City of Vineland, 22 F.3d 1283 (3rd Cir. 1994) for the proposition that municipal liability can be established even in the absence of an underlying constitutional violation. This proposition directly conflicts with the Eleventh Circuit authority cited above and is, therefore, neither controlling nor persuasive.

[7] Count V does not rely on the right to familial association or the right of access to courts as constitutional violations upon which supervisory or municipal liability is premised.

> That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their *individual capacities*. Unless a government agents' act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit. ... Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity.

Id. at 1149 (citations and footnote omitted).

The qualified immunity determination involves a two-step process. First, the defendant must prove that he was acting within the scope of his discretionary authority when the alleged wrongful conduct occurred. Jordan v. Doe, 38 F.3d 1559, 1565 (11th Cir. 1994). A defendant may discharge this burden by establishing that the actions were undertaken in performance of his duties and were within the scope of his authority. Id. Once the defendant has met this burden, the plaintiff must demonstrate that the defendant violated clearly established law.[8] Id.

---

[8] The qualified immunity analysis requires that the Court first "'first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all'" before proceeding to the question of whether the law was clearly established. Stanley v. City of Dalton, 219 F.3d 1280, 1285-86 (11th Cir. 2000) (quoting Wilson v. Layne, 526 U.S. 603 (1999) (internal quotations omitted)). The Court's determination that plaintiff has established a genuine issue of material fact as to the merits of her First Amendment claim satisfies this step of the qualified immunity analysis.

Initially, plaintiffs argue that defendant Hill has failed to demonstrate that he was acting within the scope of his discretionary authority.[9] In Harbert Internat'l v. James, 157 F.2d 1271 (11th Cir. 1998), the Eleventh Circuit defined the proper inquiry in this regard:

> The inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act. Framed that way, the inquiry is no more than an "untenable" tautology. "Instead a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties."

Id. at 1282 (quoting In re Allen, 106 F.3d 582, 594 (4th Cir. 1997)). Here, the act complained of is Hill's pursuit of the truck in order to arrest the driver for speeding. Plaintiffs argue that Hill's pursuit was not within his discretionary authority because the pursuit violated both state law and Gulf Shores Police Department policy.

Plaintiffs first argue that Hill's actions violated state law because most of the pursuit took place outside Gulf Shores' police jurisdiction. Contrary to plaintiffs' argument, Alabama law does not restrict a police officer's arrest powers to the police jurisdiction. "An arrest may be made, ... [with] or without a warrant, by ... a policeman of any incorporated city or town *within the limits of the county*." Ala. Code § 15-10-1

---

[9] Although plaintiffs use the term "defendants" at times when discussing the parameters of discretionary authority, they do not challenge defendant Bourne's assertion that he was acting within the scope of his discretionary authority. All of plaintiffs' arguments are addressed to the scope of Officer Hill's discretionary authority.

(1975) (emphasis added). If an arrest is made outside the county in which the town is located, then it must be within the town's police jurisdiction. Id. Plaintiffs cite Newton v. Town of Columbia., 695 So.2d 1213 (Ala. Civ. App. 1997), for the proposition that a police officer may not make an arrest outside his city's police jurisdiction. However, in Newton the town was located in Houston County, but the arrest took place in neighboring Henry County. Because there was evidence that the arrest took place outside the Columbia police jurisdiction *and* in another county, the Alabama Court of Civil Appeals held that the arrest may have been outside the officer's authority. Because the pursuit in this case took place in Baldwin County, which encompasses the City of Gulf Shores, Officer Hill was not limited to his police jurisdiction and did not act outside the scope of his authority.

Plaintiffs also contend that Hill's actions were outside the scope of his authority because the pursuit violated an Alabama law that requires an officer to use emergency lights and sirens when exceeding the speed limit See Ala. Code § 32-5A-7(c) (1975). In Williams v. Crook, 741 So.2d 1074, 1077 (Ala. 1999), the Alabama Supreme Court held that compliance § 32-5A-7(c) was mandatory so that an officer's failure to comply made his actions "ministerial" rather than "discretionary." That distinction meant that the officer could not avail himself of discretionary function immunity under state law. Whether an act is ministerial is not the deciding factor in qualified immunity. The question is whether the act-in this case the pursuit to make a traffic violation arrest-was within the scope of the officer's discretionary duties, and Alabama law establishes that it is. See Ala. Code § 15-10-1 (1975).

Plaintiffs have cited no authority for their argument that Hill's failure to follow departmental policies rendered his

actions outside the scope of his discretionary duties. Plaintiffs argument is not logical. An officer's failure to pursue a suspect or to make an arrest in the precise manner prescribed by his department does not mean that he had no authority to pursue the suspect or to make the arrest in the first instance.

In sum, defendants Hill and Bourne have offered evidence that they were acting within the scope of their discretionary authority when they took the actions that give rise to this lawsuit. Therefore, the burden shifts to plaintiffs to demonstrate that the constitutional right or rights allegedly violated by these defendants were clearly established.

In their attempt to satisfy their burden on qualified immunity, plaintiffs have addressed only one alleged constitutional violation-the Fourteenth Amendment substantive due process violation resulting from Hill's pursuit. Consequently, they have failed to satisfy their burden of demonstrating that the law was clearly established as to any other alleged constitutional violations asserted in the complaint, and Hill and Bourne are entitled to qualified immunity as to each of those alleged violations.

Plaintiffs' attempt to demonstrate that the pursuit violated clearly established Fourteenth Amendment due process rights also falls short. "In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821,827 n. 4 (11th Cir. 1997) (en banc). Furthermore, case law from the appropriate sources must "provide the 'bright line' necessary to delineate the concrete circumstances in which officials will violate the Constitution. Santamorena v. Georgia Military College, 147 F.3d 1337, 1341 (11th Cir.

1998). The only controlling case law plaintiffs cite is the Supreme Court's decision in Lewis and an earlier Eleventh Circuit decision, Canon v. Taylor, 782 F.2d 947 (11th Cir. 1986), neither of which provides the "bright line" necessary.[10] In fact, in both of those cases the courts found that the conduct at issue did not violate the Fourteenth Amendment. Cases so dissimilar to the case at hand obviously cannot be "materially similar." See Lassiter, 28 F.3d at 1150. If public officials are not required to be creative or to draw analogies from earlier cases in order to determine whether their conduct violates the constitution, id., then they surely cannot be expected to glean what is a constitutional violation from case law that tells them only what is not.

In response to the qualified immunity defense asserted by defendants Hill and Bourne, plaintiffs have failed to demonstrate that any of the constitutional rights allegedly violated were clearly established. Therefore, these defendants are entitled to qualified immunity as to the federal law claims asserted against them in their individual capacities.

State Law Claims

Issues Presented

Initially, defendants urge that because the federal law claims are due to be dismissed in their entirety the Court should to decline to exercise pendent jurisdiction over the remaining state law claims. Obviously, that argument is without merit since the Court has determined that one federal

---

[10] Plaintiffs also rely on a Fifth Circuit case, Checki v. Webb, 785 F.2d 534 (5th Cir. 1986) and a district court case, Easterling v. City of Glennville, 694 F. Supp. 911 (S.D. Ga. 1986), neither of which can clearly establish the law in this circuit.

law claim survives the motion to dismiss. Alternatively, defendants argue that Counts VI, VII and VIII should be dismissed because there is no private right of action for violations of the Alabama constitution and that Counts IX and X should be dismissed because these claims did not survive the death of plaintiffs' decedents. In addition, defendants Hill and Bourne contend that they are entitled to discretionary function immunity under state law.

State Constitutional Law Claims

The Amended Complaint asserts claims based on violations of the state constitution against Hill (Counts VI and VII) and against the City of Gulf Shores and Chief Bourne (Count VIII). In Mathews v. Alabama A & M University, 787 So.2d 691 (Ala. 2000), the Alabama Supreme Court held that there is "[no] private cause of action for monetary damages based on violations of the provisions of the Constitution of Alabama of 1901[.]" Id. at 697. In light of this decision, the Court finds that Counts VI, VII and VIII are due to be dismissed for failure to state a claim.[11]

---

[11] Plaintiffs argue that Mathews is not good law because "the appellant therein apparently either abandoned or did not properly brief the issue as to whether a Plaintiff can maintain a cause of action based on violations or provisions of the Alabama Constitution." (Pl.'s Brf. p. 24.) Plaintiffs urge the Court to certify the issue to the Alabama Supreme Court "for clarification." There is, however, nothing to be clarified. The Mathews opinion is very clear. Plaintiffs do not enlighten this Court as to how they can discern that the issue was not properly briefed, other than their own conclusion that the decision was "incongruous."

Negligence and Wanton/Willful Conduct Claims

Defendants' argument in support of dismissing Counts IX and X is based on their characterization of these claims as something other than wrongful death claims. Under Alabama's Wrongful Death Statute, a personal representative may commence an action and recover damages for "the wrongful act, omission, or negligence of any person, persons or corporation" that caused the death of his decedent. Ala. Code § 6-5-410 (1975). Alabama law does not, however, permit a personal representative to maintain a tort claim on behalf of the decedent's estate unless that claim was filed prior to the decedent's death. Ala. Code § 6-5-462 (1975). Plaintiffs argue that the claims in issue are permissible under the Wrongful Death Statute, while defendants contend that the claims are tort claims on behalf of the decedents that were extinguished upon their deaths. Upon review of the Counts IX and X, the Court concludes that they can fairly be read to state causes of action for wrongful death.[12] Consequently, these claims are not due to be dismissed. (Am. Compl. ¶ 48.)

State Law Discretionary Function Immunity

Defendant Hill contends that he is entitled to immunity from liability pursuant to Ala. Code § 6-5-338(a) (Supp. 2000) which extends discretionary function immunity to

---

[12] In Count IX, plaintiffs, in their representative capacities, assert a claim against all defendants for negligence "as a direct and proximate result of [which] ... the [p]laintiffs' decedents were killed." (Am. Compl. ¶ 47.) In Count X, plaintiffs assert a claim against defendant Hill for "acts and omissions... [that] were intentional, malicious, willful and wanton and in bad faith entitling the [p]laintiffs to judgment... for ... damages associated with the wrongful death of their children"

municipal police officers. Plaintiffs counter, first, that Hill was not performing a discretionary function and, second, that discretionary function immunity does not apply to conduct that is willful, malicious or in bad faith. Discretionary function immunity is "immunity from tort liability afforded to public officials acting within the general scope of their authority in performing functions that involve a degree of discretion." Grant v. Davis, 537 So.2d 7, 8 (Ala. 1988). If the act alleged to have caused the injury was not discretionary, then discretionary function immunity does not apply. Williams, 741 So.2d 1076. Viewed liberally and in the light most favorable to the plaintiffs, there are facts from which a factfinder could determine that Hill's conduct was not discretionary. As discussed above, *supra* p. 15, the Alabama Supreme Court has held that a police officer who allegedly caused an accident by failing to use emergency lights and sirens when exceeding the speed limit was not entitled to discretionary function immunity because mandatory use of emergency equipment is not a discretionary function. To the extent that the complaint alleges that Hill's failure to use emergency lights and sirens caused the accident, Hill is not be entitled to dismissal of the state law claims against him on discretionary function immunity grounds.

Additionally, Hill is not entitled to discretionary function immunity as to claims asserted in Count X for conduct that was allegedly willful, malicious or in bad faith. In Ex parte City of Montgomery, 758 So.2d 565 (Ala. 1999), the Alabama Supreme Court held that the defendant police officer was entitled to discretionary function immunity under § 6-5-338 "unless his actions were conducted with willful or malicious intent or in bad faith." Id. at 570. Because Count X alleges conduct that falls outside the scope of discretionary function immunity, defendant Hill's motion to dismiss that count on immunity grounds is due to be denied.

Conclusion

The motion to dismiss the Amended Complaint is due to be granted, in part, and denied, in part. Specifically, Count I is due to be dismissed because defendant Hill, the only defendant named in that count is entitled to qualified immunity. Counts II, III and IV are due to be dismissed because plaintiffs have failed to allege the violation of a constitutional right in any of those counts. In addition, qualified immunity applies to defendants Hill and Bourne to the extent they are sued in their individual capacities in Counts II, III, IV or V. Count V is the only federal law claim that remains viable and that viability is only insofar as that count is premised on-municipal liability against the City of Gulf Shores for violation of the Fourteenth Amendment substantive due process rights of plaintiffs' decedents.

Plaintiffs' state law claims arising from the Alabama constitution in Counts VI, VII and VIII are due to be dismissed because state law does not recognizes a private right of action for violation of the state constitution. Because Counts IX and X state claims for wrongful death under Alabama law, those claims were not extinguished upon the deaths of plaintiffs' decedents. Therefore, the motion to dismiss is due to be denied as to Counts IX and X. Finally, defendant Hill's motion to dismiss state law claims against him based on discretionary function immunity is due to be denied.

In summary, plaintiffs' only remaining § 1983 claim is for municipal liability against the City of Gulf Shores for violation of the Fourteenth Amendment's Due Process Clause arising from the pursuit of the vehicle in which plaintiffs' decedents' were passengers (Count V). The remaining state law claims are claims for wrongful death caused by

negligence against all defendants (Counts IX) and wrongful death caused by willful and wanton conduct against defendant Hill (Count X).

Therefore, it is **ORDERED** that Counts I, II, III, IV, VI, VII, and VIII of the Amended Complaint be and hereby are **DISMISSED** for failure to state a claim upon which relief can be granted. It is **FURTHER ORDERED** that the motion to dismiss be and hereby is **DENIED**, in part, as to Counts V, IX and X.

DONE this the 27th day of March, 2002.

/s/_____
CHIEF DISTRICT JUDGE